AMERICAN CIVIL LIBERTIES UNION of NEW JERSEY
FOUNDATION

P.O. Box 32159
Newark, NJ 07102

Tel: 973-642-2086
Fax: 973-642-6523

info@aclu-nj.org
www.aclu-nj.org

ALEXANDER SHALOM
Senior Supervising Attorney

973-854-1714
ashalom@aclu-nj.org

April 5, 2018

VIA ELECTRONIC FILING
Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-48-17 *State v. Shaquan Hyppolite* (080302)
Appellate Division Docket No. A-000742-17

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), kindly accept this letter-brief on behalf of *Amicus Curiae* American Civil Liberties Union of New Jersey.

TABLE OF CONTENTS

PRELIMINARY STATEMENT

Although a prosecutor's obligation to turn over discovery in a detention hearing is now well established, the Court has yet to determine the appropriate remedy for a violation of those obligations. This case provides the first opportunity to do so. In picking a remedy the Court must be guided by two equally important principles: First, the detention hearing, although not a final adjudication on the merits of the case, is a critically important event for both the defendant and the State. Second, the goals that underlie the Criminal Justice Reform Act (CJRA) – ensuring appearance at trial, protecting public safety, and preventing obstruction of justice – must animate the choice of remedy.

With those principles in mind, the Court can craft an appropriate remedy for what is, indisputably, a violation of the State's obligation to turn over all exculpatory material in its possession prior to a detention hearing. (Point I). As an initial matter, courts must reopen detention hearings upon a finding that the State failed to provide exculpatory material sufficiently in advance of a detention hearing. (Point II). Despite the trial court's efforts to streamline the process, situations such as the one in this case are ill suited for harmless error analysis. When a defendant has been denied exculpatory information – or any discovery to which he is entitled – he cannot appropriately make decisions about exercising his right to present evidence at the

pretrial detention hearing. Should he testify? Should he call witnesses? Should he offer information by proffer? Thus, judges cannot rely upon the initial hearing as a trustworthy baseline. That is, courts cannot simply take the initial hearing, add to it the exculpatory information, and determine whether the result would be different. Courts must begin anew in evaluating whether probable cause exists and whether detention is appropriate.

Although *amicus* ACLU-NJ does not advocate for a rule whereby courts must release defendants as a prophylactic measure to prevent prosecutors from willfully withholding exculpatory evidence, courts are not powerless to prevent such misconduct. (Point III). Unlike for police officers, where the exclusionary rule serves as the only effective method for courts to promote compliance with the law, courts have broad authority over prosecutors. In instances of egregious or deliberate withholding of exculpatory information (which, admittedly, will be a small subset of instances where exculpatory information is not turned over), courts can use the rarely-utilized option of making a referral to an ethics board to prevent subsequent misconduct.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For the purposes of this brief, *amicus* relies on the statement of facts contained in Defendant's Motion for Leave to Appeal, dated December 4, 2017.

LEGAL ARGUMENT

I. THE STATE FAILED TO MEET ITS DISCOVERY OBLIGATION.

There is no legitimate debate in this case: the State failed to turn over several pieces of evidence that were exculpatory. Specifically, the State failed to provide reports (which it had in its possession) that indicated that the sole witness relied upon by the State had previously admitted he was "high as shit" and had not seen the shooter. LTA 6, n. 7.[1] Additionally, the State failed to disclose reports (which it also had in its possession) that revealed that another witness to the incident had reported a different number of people involved than the State's key witness had. *Id.* Finally, the State failed to disclose reports which discredited the key witness's account, because they made clear that someone the witness placed at the scene had actually been incarcerated at the time of the incident. The trial court properly held both that the evidence was exculpatory (DA 5-6) and that the State failed to disclose it. *Id.*

Before this Court, the State contends that such a violation either did not exist, or, if it did, was excusable. The State seems to suggest – contrary to several decades of jurisprudence – that there exists a meaningful distinction between exculpatory evidence

[1] DA refers to Defendant's Appendix;
SBr refers to the State's brief, dated December 14, 2017;
LTA refers to Defendants Motion for Leave to Appeal, dated December 4, 2017.

and impeachment evidence. Sbr 4. Even if the evidence is exculpatory, the State suggests it need not turn it over because it is not "material." *Id.* at 5-9. The State further confuses the issue by explaining that the evidence is not "clearly exculpatory," which, as the State correctly notes, is the test for that which must be presented to a Grand Jury, *State v. Hogan*, 144 *N.J.* 216, 237 (1996), not what must be turned over in pre-detention hearing discovery. Sbr 7-8.

The State's position marks a dramatic departure from the position advanced by the Attorney General's office in *State v. Robinson*, 229 *N.J.* 44 (2017). During oral argument in that case, the Director of the Division of Criminal Justice, Elie Honig explained: "The second category of discovery at the pretrial detention phase is simply all exculpatory evidence. *Period*. *No limitations, no qualifications*. We embrace that obligation at pretrial detention hearings and always." New Jersey Supreme Court oral argument video achieve, available at: http://165.230.71.5/query.php?var=A-40-16. (2:54-3:08) (emphasis added). The State's position was correct in *Robinson*; its new position here is not.

Taking the arguments in inverse order, the standard that governs grand jury presentations is tied to evidence that is "*clearly* exculpatory," (*Hogan*, 144 *N.J.* at 238 (emphasis added)) whereas the detention hearing discovery *Rule* requires the

provision of *all* exculpatory evidence. *R*. 3:4-2(c)(1)(B). There is no basis for reading in the "clearly" qualifier into a *Rule* that omitted it.

Similarly, there exists no materiality requirement in the *Rule.* The language of the *Rule* is perfectly clear: "*All* exculpatory evidence" must be disclosed. *R*. 3:4-2(c)(1)(B) (emphasis added). The *Rule,* in other words, requires more than that which is required by *Brady v. Maryland*, 373 *U.S.* 83 (1963). *Brady* requires only that exculpatory evidence that is "material either to guilt or to punishment" be disclosed. *Brady*, 373 *U.S.* at 87. The discovery *Rule* plainly contains no materiality requirement.

Finally, the State contends that the *Rule* requires the provision of "exculpatory" material, but not impeachment material. Sbr 4. While this may have been a plausible argument when *Brady* was decided, the United States "Supreme Court has consistently treated impeachment evidence as a form of 'evidence favorable to the accused' subject to the *Brady* disclosure standards." R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 *Vand. L. Rev.* 1427, 1434 (2011). Indeed, the Supreme Court has explicitly "rejected any such distinction between impeachment evidence and exculpatory evidence." *United States v. Bagley*, 473 *U.S.* 667, 676 (1985).

The *Rule* governing discovery in detention hearings could not be clearer: "if the prosecutor is seeking pretrial detention . .

[a]ll exculpatory evidence" must be disclosed. *R*. 3:4-2(c)(1)(B). The State failed to honor its obligation under that *Rule.* What, then, is the appropriate remedy?

II. AS A RESULT OF THE VIOLATION, DEFENDANT IS ENTITLED TO A NEW DETENTION HEARING.

Whenever the State fails to turn over exculpatory information prior to a detention hearing, a new hearing should be ordered. This situation is somewhat analogous to when a prosecutor violates *Brady*, where the remedy is a new trial. *State v. Landano*, 271 *N.J. Super.* 1, 32-33 (App. Div. 1994) (explaining that while tests for materiality differ based on type of evidence withheld, remedy for a material violation is always reversal of the conviction). In U*nited States v. Coleman*, the Court of Appeals for the Third Circuit explained why courts require such a remedy: "The awarding of a new trial to remedy a *Brady* violation insures that the defendant will be able to make full use of the exculpatory evidence during the subsequent proceeding. Additionally, such a limited remedy furthers the societal interest in prosecuting criminal defendants to conclusion." 862 *F*.2d 455, 458-459 (3rd Cir. 1988).

However, there is a fundamental difference between withholding exculpatory materials in the context of pre-trial detention hearings and *Brady* withholdings. The duty[2] to disclose

[2] *Amicus* refers here to the constitutional duty to disclose. As discussed below (*infra*, Point III), *RPC* 3.8(d) imposes a broader ethical duty on prosecutors.

evidence favorable to the defense under *Brady* is only triggered when the evidence is material. 373 *U.S.* at 87. Put differently, the failure to turn over non-material exculpatory information is not a violation of *Brady*. This leads to a type of "harmless error" analysis in the *Brady* context.

This sort of harmless error analysis has no place in the context of exculpatory information withheld in advance of detention hearings, most notably because *Rules* related to detention hearings protect defendants against the harsh result of pretrial incarceration by entitling defendants to *all* exculpatory evidence before deciding how to craft and present their arguments for release. As explained further below, the withholding of any exculpatory evidence would violate a defendant's rights, would have infected the detention hearing that previously occurred, and a hearing *ab initio* is thus the necessary remedy. Indeed, harmless error analysis (as the trial court conducted here in improperly denying a re-hearing despite acknowledging the violation of the obligation to turn over exculpatory evidence, DA6) is improper for at least three reasons: First, it is inefficient because it ignores the critical distinctions between the summary detention hearings process and trials; second, it fails to consider the many ways in which exculpatory information might be utilized by a defendant; and third, it is cuts against the Legislative intent of the Criminal Justice Reform Act (CJRA).

Hearings at which trial courts seek to determine whether prosecutors violated *Brady* are complex: courts must determine whether evidence was withheld and the impact it would have on a trial. *See, e.g.*, *State v. Carter*, 91 *N.J.* 86, 95 (1982) ("The trial court held extensive hearings and submitted detailed findings. It found that there was no *Brady* violation. . . . "). The expenditure of those significant resources, of course, makes sense, because when a court finds a violation, a new trial – with its even greater required resources – must occur. It makes perfect sense to spend a day or even days to prevent the unnecessary re-litigation of a weeks-long trial. Detention hearings are, by their nature, shorter proceedings. *State v. Robinson*, 229 *N.J.* 44, 68 (2017) ("In the case of a detention application, the focus is not on guilt, and the hearing should not turn into a mini-trial."). It makes little sense to spend hours considering evidence, only to determine that there exists no reason to reopen a detention hearing that would have been completed in the time required to make that determination.

More fundamentally, as previously suggested, it is unfair to a defendant for a court to simply look at the evidence presented in the initial detention hearing, add to it the exculpatory evidence that was withheld, and determine whether probable cause exists (*N.J.S.A.* 2A:162-19(e)(2)) and detention is required. *N.J.S.A.* 2A:162-20. After all, the evidence has been withheld at

the *discovery* phase. Armed with that information, the defendant can take advantage of several of the due process protections built into the CJRA. For example, the defendant might choose to testify (*N.J.S.A.* 2A:162-19(e)(2)), to present witnesses (*id.*), or to present information by proffer or otherwise (*id.*). Of course, if the State had called any witnesses, the defendant could also cross-examine them. *Id.* Even though the State chose not to call any witnesses at the detention hearing (SBr 5), Defendant still had the ability to utilize the information in a variety of ways. Indeed, it is possible that, in light of the evidence now available, either the State would choose to call a witness or the court would determine that a live witness was necessary. *See State v. Ingram*, 230 *N.J.* 190, 213 (2017) ("trial court has discretion to require direct testimony if it is dissatisfied with the State's proffer."). There is simply no way to predict the many directions a detention hearing might proceed if a defendant were armed with the information to which he was entitled.

It has been said several times before, but it bears repeating: significant due process attaches to pretrial detention hearings because being jailed pretrial exacts a significant toll on criminal defendants. As the Joint Committee on Criminal Justice explained:

> Research during the past half century has clearly and consistently demonstrated that being incarcerated before trial can have significant consequences: defendants detained in jail while awaiting trial (1) plead guilty

> more often; (2) are convicted more often; (3) are sentenced to prison more often; and (4) receive harsher prison sentences than those who are released during the pretrial period.
>
> [Report of the Joint Committee on Criminal Justice, March 10, 2014, at 1-2.]

The Joint Committee knew that it is not only defendants' cases that suffer when defendants are incarcerated pretrial: their lives suffers too. "If defendants remain in jail pending trial, they lose their liberty before they are convicted of anything. They are separated from family members. They are unable to work and may ultimately lose jobs and the ability to support their family in the future." *Id.* at 17.

In passing the CJRA and adopting the *Rules* associated with it, the Legislature and Court were cognizant of both the incredible toll that pretrial incarceration takes and that United States Constitution only permits pretrial detention in the rarest cases after hearings where defendants receive robust due process rights. *United States v. Salerno*, 481 *U.S.* 739, 755 (1987) ("detention prior to trial or without trial is the carefully limited exception"). As a result, the CJRA and *Rules* provide defendants with significant due process prior to the imposition of an order detaining them for the pendency of the pretrial period. When the State denies defendants those due process protections (here, the provision of all exculpatory information prior to detention hearings) it jeopardizes the integrity of the system. The high

stakes of detention hearings counsel against shortcuts to remedy deprivations of due process, no matter how insignificant.

As illustrated above, there are good policy reasons to provide a defendant a new detention hearing whenever the State fails to provide exculpatory evidence in advance of a detention hearing. Such a remedy also hews closest to the intent of the Legislature. The CJRA provides a liberal standard for reopening detention hearings. *N.J.S.A.* 2A:162-19(f) ("The hearing may be reopened, before or after a determination by the court, at any time before trial, if the court finds that information exists that was not known to the prosecutor or the eligible defendant at the time of the hearing and that has a material bearing on" the appropriateness of detention). Given the streamlined nature of detention hearings, it is little surprise that the Legislature made it easy to reopen them. It makes little sense to spend more energy trying to decide if a defendant is entitled to a hearing than is required to hold the hearing itself.

A rule mandating the reopening of detention hearings serves the dual purposes identified in U*nited States v. Coleman*, 862 *F*.2d at 458-459: ensuring that the defendant will be able to make full use of the exculpatory evidence during the subsequent proceeding[3]

[3] Despite the fact that a defendant may need to file a motion to trigger the new (reopened) hearing, the filing of that motion should not toll the speedy trial clock. Although *R.*3:25-4(i)(3) generally stops the speedy trial clock when a motion is filed, the

and protecting societal interests by ensuring that courts use detention to protect public safety only when required.

III. THE COURT SHOULD ADDITIONALLY DETER WILLFUL OR EGREGIOUS VIOLATIONS OF DISCOVERY RULES WITH REFERALS TO ETHICS BODIES OR CONTEMPT AUTHORITY.

Evidence suggests that prosecutors in New Jersey, generally, take their obligation to provide exculpatory evidence seriously. Alexander Shalom and George C. Thomas, III, *Trial and Error: A Comprehensive Study of Prosecutorial Conduct in New Jersey* (hereinafter *Trial and Error*) (Sept. 2012), at p. 15, available at: http://www.aclu-nj.org/files/1413/4815/6876/ACLU-NJ_Pros_Cond_Color.pdf. (noting only nine instances where courts identified discovery-based prosecutorial error over a more-than-six-year period).[4] Many, even most, instances where a prosecutor fails to provide exculpatory evidence in advance of a detention hearing, as required by *R.* 3:4-2(C)(1)(B) and *Robinson*, 229 *N.J.* at 71, will be the result of failures by people other than the

---

Rule also provides that "The failure by the prosecutor to provide timely and complete discovery shall not be considered excludable time unless the discovery only became available after the time established for discovery." *R.* 3:25-4(i). This is such an instance.

[4] Of course, the study only measured instances where courts found that prosecutors violated the dictates of *Brady v. Maryland.* There are two limitations to that analysis. First, it only captures the failure to turn over *material* exculpatory evidence. As noted above, (*supra*, Point I), the CJRA contains no materiality requirement. Second, the study only addresses instances where courts learn of *Brady* violations. There exists no way of knowing whether or at what rate prosecutors withhold evidence without it coming to the attention of courts.

assistant prosecutor. *See id.* (explaining that the obligation to provide discovery is triggered whenever appropriate statements and reports "are in the possession of the prosecutor, law enforcement officials, and other agents of the State"). Amongst the small set of discovery violations where the prosecutor herself is to blame, few instances will reflect willful misconduct or egregious instances of negligence. *Cf. Giglio v. United States,* 405 *U.S.* 150, 154 (1972) (holding that even negligent nondisclosure is the responsibility of the prosecutor). It is that rare subset of a subset, about which Defendant and *amicus* are appropriately most concerned. LTA 2.

Unlike the regulation of police behavior, which requires a prophylactic exclusionary rule to deter misconduct (*State v. Shannon*, 222 *N.J.* 576, 593 (2015) (LaVecchia, J., concurring) (noting deterrence as one rationale supporting exclusionary rule); *see also id.* at 597 (Solomon, J, dissenting) (expressing view that deterrence is the primary rationale behind exclusionary rule)), courts have other tools at their disposal to regulate the conduct of lawyers. Courts have historically been reluctant to involve themselves with ethics violations of lawyers, particularly prosecutors, who appear before them. *Trial and Error* at 28 (explaining that over the last decade, prosecutors had not once faced ethics consequences for in-court behavior); *id.* at 33, n. 52 (noting that the study authors were able to identify only four

instances where courts referred prosecutors for disciplinary action – usually simply to their supervisors); *see also State v. Clarence McKinley Moore*, A-1910-87T4, Slip. Op. at 7 (App. Div. April 1, 1991) (unpublished opinion) ("Our role, however, is not to supervise or punish prosecutorial misconduct").[5] But that need not be the case. *See, generally*, Leslie W. Abramson, *A Symposium On Judicial Independence: The Judge's Ethical Duty To Report Misconduct By Other Judges And Lawyers And Its Effect On Judicial Independence*, 25 Hofstra L. Rev. 751 (1997).

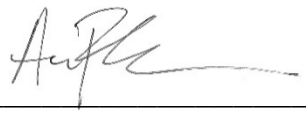
Indeed, judges are explicitly empowered by the Rules of Judicial Conduct to report reliable information about violations of the Rules of Professional Conduct (RPCs) to disciplinary authorities. *R.* 3.15(B) (explaining that judges *should* take appropriate action, including notification of the proper disciplinary authority when they learn of violations of the RPCs). Where a violation of the RPCs "raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer," the Rule of Judicial Conduct is no longer a mere recommendation: it becomes a command. *Id.* (noting that judges *shall* report violations under these circumstances).

[5] Pursuant to *R*. 1:36 the opinion is attached to this brief. Counsel is aware of no case that stands for the contrary proposition. The unpublished opinion is Appendix D in *Trial and Error.* Because the case was included as an appendix in another brief, it is paginated as 39a-51a.

Not all violations of discovery obligations amount to ethics violations. But, prosecutors in criminal cases must "make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. . . ." *RPC* 3.8(d). Trial judges could meaningfully deter prosecutors from withholding exculpatory evidence in detention hearings if courts referred instances of serious or intentional concealment to district ethics boards. Indeed, the relative rarity of judicial referrals to ethics boards would increase the impact should judges begin to make such referrals.

CONCLUSION

For the foregoing reasons, this Court should reverse the Order granting the preventative detention of Defendant and remand for a new detention hearing, at which time Defendant can utilize the discovery that was provided after the initial hearing.



Alexander Shalom (021162004)
Edward Barocas
Jeanne LoCicero
American Civil Liberties Union
of New Jersey Foundation
89 Market Street, 7th Floor
P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1714

DATED: April 5, 2017

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1910-87T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CLARENCE McKINLEY MOORE,

Defendant-Appellant.

Argued February 19, 1991 - Decided APR -1 1991

Before Judges Bilder, Muir, Jr. and Brochin.

On appeal from the Superior Court of New Jersey, Law Division Atlantic County.

Marianne Rebel Montgomery, Designated Counsel, argued the cause for appellant (Wilfredo Caraballo, Public Defender, attorney; Ms. Montgomery, of counsel and on the brief).

Nancy A. Hulett, Deputy Attorney General, argued the cause for respondent (Robert J. Del Tufo, Attorney General, attorney; Ms. Hulett, on the brief).

PER CURIAM

Following a jury trial defendant was convicted of burglary (count 1), two counts of robbery (counts 2 and 3) and three counts of aggravated sexual assault (counts 5, 6 and 7). At sentencing the trial judge merged the robbery convictions and the aggravated sexual assault convictions. Defendant was sentenced to an extended term of life with a minimum of 25

years for the aggravated sexual assault, a concurrent term of 20 years for the robbery and a concurrent term of 10 years for the burglary; an aggregate sentence of life with a minimum of 25 years. Defendant appeals from the convictions and the sentence. The State cross-appeals from the merger of the aggravated sexual assault convictions.

In the early hours of January 14, 1986, sometime after 1:20 a.m., 25 year old MA was savagely raped, anally, vaginally and orally, in the bedroom of her small cottage in Somers Point. The assault was accomplished by a break-in to her home and was accompanied by the robbery of some $8. Although the lighting was poor, her myopic vision was limited and she was consumed with fear, with the aid of hypnotic enhanced memory she was able to positively identify defendant as her assailant in-court as well as in three prior out-of-court photographic line-ups. Her testimony, if accepted by the jury, was capable of establishing defendant's guilt beyond a reasonable doubt.

On appeal, defendant makes the following contentions:

POINT I

THE PROSECUTOR'S SUMMATION EXCEEDED THE BOUNDS OF PROPRIETY MAKING IT IMPOSSIBLE FOR THE DEFENDANT TO RECEIVE A FAIR TRIAL.

A. HIS RACIAL REMARKS VIOLATE THE DEFENDANT'S RIGHT TO EQUAL PROTECTION AND TO A FAIR TRIAL

B. HE IMPROPERLY IMPUTES PERSONAL RESPONSIBILITY TO THE JURY IF THEY FAIL TO CONVICT

C. HE IMPROPERLY HIGHLIGHTS THE DEFENDANT'S FAILURE TO TESTIFY

POINT II

THE TRIAL COURT ERRED IN RULING THE DEFENDANT'S PRIOR CONVICTIONS ADMISSIBLE TO ATTACK CREDIBILITY

POINT III

THE TRIAL COURT ERRED IN NOT GRANTING:

A. THE DEFENDANT'S MOTION FOR ACQUITTAL AT THE TERMINATION OF THE STATE'S CASE

B. THE DEFENDANT'S MOTION FOR JUDGMENT NOT WITHSTANDING VERDICT

C. THE DEFENDANT'S MOTION FOR A NEW TRIAL

POINT IV

THE TRIAL COURT ERRED IN ADMITTING IN COURT AND OUT OF COURT IDENTIFICATIONS OF THE DEFENDANT BY THE VICTIM

A. THE PROSECUTION FAILED TO MEET THE STANDARD IN THE HURD DECISION

B. THE PHOTO LINE UP AND IN COURT IDENTIFICATION SHOULD BE EXCLUDED DUE TO ITS UNRELIABILITY AND SUGGESTIVENESS

POINT V

THE SENTENCE IMPOSED BY THE TRIAL COURT WAS CLEARLY EXCESSIVE

POINT VI

THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR CHANGE OF VENUE OR IMPANELING A FOREIGN JURY DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

The Prosecutor's Summation

Defendant claims prosecutorial misconduct in the form of three allegedly improper comments made by the prosecutor during his summation. He contends the prosecutor injected

race into the case and appealed to racial prejudice; improperly commented on defendant's failure to testify, thus interfering with his fifth amendment rights; and improperly appealed to the emotions of the jury by suggesting an acquittal of the defendant would be an additional "assault" against the female victim. An examination of the summation in its entirety shows that the complained of comments represented a small portion of an extremely lengthy summation, are too broadly characterized by defendant and were in each case promptly and appropriately dealt with by a forceful curative instruction. See Williams v. James, 113 N.J. 619, 632 (1989).

During the testimony of his wife, the jury learned that defendant, a black man, was married to a white woman. The victim was a white woman. In his summation the prosector sought to suggest that defendant had a predilection for white women which the jury might consider in determining whether the state had proved its case.

> So I ask you this: What did we learn when we found out that Cheryl Moore was the wife of the defendant? I suggest to you in a nonracist way that what we found out was that Clarence McKinley Moore made a choice to be with a Caucasian woman --- [interrupted by objection].

The impropriety of the suggestion was forcefully expressed by the judge when he informed the prosecutor that " it is not a reasonable inference to draw from the fact that this defendant is married to a white woman that he selectively made that decision to rape or rob, [to commit] aggravated sexual assault

[upon], a white woman." He immediately gave a forceful and complete curative instruction which not only told the jury to disregard the prosecutor's remarks in this regard but told them it was an unfair and unreasonable inference and an improper argument. We are satisfied that action prevented the prosecutor's statement from substantially prejudicing defendant's right to a fair trial, see State v. Koedatich, 112 N.J. 225, 324-325, 338 (1988), cert. den., 488 U.S. 1017 (1989); that the jury can be relied on to have followed the curative instruction, see Williams v. James, supra.

No more had that instruction been given than the prosecutor made another argument which defendant contends was an additional appeal to racial prejudice. At the time of the attack on the victim, defendant's wife had recently given birth and in connection with the baby's feeding was suffering from mastitis, an inflammation of her breast glands. The prosecutor said:

> I ask you to consider that [the wife's physical condition] and infer that that would give believability to the fact that during that period of time, that is, on January 14, 1986 [the date of the attack], right in the middle of the time after the birth of the child and the disability of the wife, I ask you to infer that that is a period of time when this individual would have his greatest need for sexual release.

Defendant objected that this comment had no foundation in the evidence -- that there was nothing to indicate the parties were not having normal sexual relations. The trial judge gave another curative instruction in which he told the jury to

disregard the prosecutor's statement; that it was an unreasonable and improper inference. On appeal defendant renews that argument and adds the notion that this was a racial remark which "somehow [fed] into the stereotypical label of the black man who cannot control his sexual desires." We are satisfied that any possible prejudice was fully removed by the trial judge's prompt action. See State v. Koedatich, supra; Williams v. James, supra. The prosecutor's syllogism was a recitation of an ignorant misconception.

During his summation the prosecutor properly discussed the testimony of the defense witnesses. In the course of this he said there were two of them. Defendant contends this comment, made during the prosecutor's analysis of the testimony of the two witnesses, amounted to a comment on defendant's failure to testify. The argument is a non-sequitur. Apparently defendant did not perceive such an illogical inference at the time, for he did not object. See State v. Macon, 57 N.J. 325, 333 (1971).

Finally, at the end of the summation, the prosector closed with a plea which defendant contended when he objected at the time, and contends now on appeal, was an improper appeal to the emotions of the jury - an attempt to inflame and prejudice it.

> The last thing I have to say is that if you don't believe her [the victim] and you think she's lying, then you've probably perpetrated a worse assault on her.

Once again the jury was instructed to disregard the comment,

that it was improper. We are satisfied the judge's action here, as with the previous improprieties, prevented the prosecutor's statements from substantially prejudging defendant. See State v. Koedatich, supra; Williams v. James, supra.

Although we are persuaded that the prosecutor's conduct did not deprive defendant of a fair trial, we would be derelict if we did not express our disapproval in the strongest terms. The summation showed a disregard of the obligation of the prosecutor to play fair and see that justice is done. See State v. Johnson, 216 N.J.Super. 588, 610 (App. Div. 1987). Our role, however, is not to supervise or punish prosecutorial misconduct.[1] It is to examine the trial for fairness. Fortunately, the judge, unlike the prosecutor, was sensitive to the need for a fair trial and promptly and forcefully delivered curative instructions to the jury.

Sands

Following a Sands[2] hearing, the trial judge ruled that prior convictions of defendant for carnal abuse in 1968, burglaries in 1970 (eight convictions) and distribution and possession with intent to distribute marijuana in 1976 would

---

[1]We do, however, consider that the prosecutor's outrageous conduct violated ethical principles and urge the Attorney General to bring the matter to the attention of the appropriate ethics body.

[2] State v. Sands, 76 N.J. 127 (1978).

be admissible for purposes of impeachment if he testified at the trial. Defendant contends the rulings deprived him of a fair trial and constituted reversible error. He argues the convictions were too remote in time to have probative value particularly when weighed against the prejudicial effect of the evidence on the minds of the jurors. See State v. Sands, 76 N.J. 127, 144 (1978). He also contends the carnal abuse conviction should have been excluded because the lenient sentence "may have reflected a reduction of the charge to a lesser charge which the [rap sheet] fails to reflect."

The contentions are without merit. As the trial judge noted, the defendant's repeated criminal conduct showed a lack of respect for law which would extend to a lack of respect for the oath, id. at 145, and clearly relate to veracity, ibid. Ordinarily, evidence of prior convictions should be admitted. Id. at 144. We are satisfied that defendant did not meet his burden of justifying exclusion. Ibid. Moreover, speculation cannot form the basis for an appeal. See State v. Wilkerson, 38 N.J.Super 166, 168 (App. Div. 1955).

Hurd, The Hypnotically Refreshed Recollection And The Subsequent Identifications

After the attack the victim was unable to give more than a minimal description of her assailant. She was able to say he was black, five feet ten inches tall, weighed about 175 pounds, was muscular and was wearing blue jeans. According

to her, the lighting was sufficient to see him and she obtained a good enough view[3] while he was in her room but her fear masked further recollection. She accordingly requested that her recollection be improved by hypnosis. While hypnotized she was able to recall the assailant's face and that he was wearing a tan suede jacket with a zipper. Thereafter she not only retained that recollection but found it improved sufficiently to bring to mind the fact there had been dirt around the jacket pocket.

Immediately after her recollection had been thus enhanced, the victim helped a police artist draw a composite drawing of her assailant. About a week later she was shown a photographic lineup and promptly made a positive identification of defendant. This was repeated on two subsequent occasions and in court where defendant was identified in person.

Defendant contends the hypnotically refreshed testimony should not have been admitted because the procedure did not meet the requirements of State v. Hurd, 86 N.J. 525, 544-547 (1981). He also contends the photo lineups were suggestive and that all the out-of-court and in-court identifications were infected by the alleged hypnotically refreshed recollection and the subsequent suggestive identification

---

[3]Although defendant suggests in his brief that the victim's vision was impaired by the fact she was not wearing her contact lenses, the victim clearly testified her vision problem affected distant objects; that she could see relatively near things without glasses.

procedures.

Defendant's contentions are without merit. Following a thorough Hurd hearing, the trial judge found that all the standards set forth by the Supreme Court had been fully complied with. Id. at 545-546. We are satisfied the use of hypnosis was appropriate for the victim's fear-induced traumatic neurosis, id. at 544, and that the trial judge's findings as to the procedures employed and adherence to the Hurd requirements were supported by substantial credible evidence in the record. See State v. Johnson, 42 N.J. 146, 162 (1964). On the other hand, defendant's contentions that Dr. Babcock was not independent of the prosecutor and the suggestions that discussions with Detective Gray and the victim were unrecorded and that Gray's presence in the outer office somehow intruded upon the privacy of the hypnotic session find no support in the record. Similarly unsupported are the contentions that there was insufficient light to see defendant and that the victim could "only see a blur without her contact lenses." The victim testified otherwise and the jury was free to believe her.

Defendant's contentions as to the photographic lineups are similarly without merit. We agree with the trial judge that there was no evidence of suggestiveness and that the victim's opportunity and ability to see her assailant at the time of the attack were established. See State v. Madison, 109 N.J. 223, 231-233 (1988). Here again, the trial judge's

findings are supported in the evidence. See State v. Johnson, supra.

Sufficiency of the Evidence

Defendant contends there was insufficient evidence to sustain a conviction. He argues that the poor lighting conditions, the victim's inability to see without glasses[4], and the fleeting look she took of her assailant foreclosed reliable identification - the critical factor in the State's case. He accordingly claims error in the denial of his motions for acquittal, for judgment n.o.v. and for a new trial.

In ruling on the motion for a new trial the trial judge made a careful analysis of the evidence with respect to the ability of the victim to have seen and identify her assailant. An examination of the record fully substantiates his recital and satisfies us that the conviction is supported by substantial credible evidence and does not constitute a manifest denial of justice. See State v. Carter, 91 N.J. 86, 96 (1982). The trial judge's view of the case should be given substantial weight. Ibid.

[4] The victim was nearsighted and could not see more than a few feet without her contact lenses. At the time of the attack objects that were more than a couple of feet away were a blur.

The Motion for a Change of Venue or Foreign Jury

Defendant contends that pre-trial publicity prevented him from obtaining an impartial jury from among the members of the local jury panel. We are satisfied the denial of the motions for change of venue or a foreign jury was not error. See State v. Williams, 93 N.J. 39, 63 (1983). More importantly, we are satisfied that the voir dire insured an impartial jury. See State v. Gary, 229 N.J.Super 102, 111 (App. Div. 1988).

The Sentence

Defendant contends that the statutory criteria for the imposition of an extended term as a persistent offender, see N.J.S.A. 2C:44-3a, were not properly proved and that, in any event, the sentence imposed was clearly excessive. We are satisfied that the trial judge's findings with respect to the extended term were supported by proper evidence, see State v. Johnson, supra, and that defendant's contention as to the excessiveness of the sentence is without merit. See State v. O'Donnell, 117 N.J. 210, 215 (1989); State v. Roth, 95 N.J. 334, 365-366 (1984).

By cross-appeal, the State claims error in the merger of the three aggravated sexual assault convictions. We agree. See State v. Fraction, 206 N.J. Super. 532, 536-540 (App. Div. 1985), certif. den. 104 N.J. 434 (1986).

The merger of the three aggravated sexual assault

convictions is reversed and the matter remanded for resentencing as to those counts. The convictions and sentences are otherwise affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Clerk